

**BEFORE THE STATE OF WASHINGTON**  
**ENERGY FACILITY SITE EVALUATION COUNCIL**

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In the Matter of Application No. 2003-01  
SAGEBRUSH POWER PARTNERS, LLC,  
KITTITAS VALLEY WIND POWER PROJECT

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SUPPLEMENTAL AND RESTATED OPENING STATEMENT  
OF  
RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT)

Residents Opposed to Kittitas Turbines (ROKT)<sup>1</sup> requests that the Energy Facility Site Evaluation Council (EFSEC) recommend to the governor that she deny the Site Certification Application for Kittitas Valley Wind Power Project.

## **I.**

### **Introduction**

Sagebrush Power Partners, LLC (“Sagebrush Partners” or “Horizon”) has requested the Energy Facility Site Evaluation Council (EFSEC) to recommend two (2) actions: (1) the state preempt the application of local land use ordinances, regulations, rules and procedures and local determinations following lengthy public processes; and (2) the approval of a site specific proposal of the intrusive wind farm proposed in the scenic foothills of Kittitas County. Kittitas County and its citizens have engaged in a thorough and thoughtful process to review and locate wind farm projects. The focus is not the value of wind energy but rather the “location” of these intense and intrusive activities. Preemption is not continenced by sound land use planning; developed land use statutes (Growth Management Act – RCW 36-70A) or local zoning ordinance and procedures; or historic EFSEC processes.

Residents Opposed to Kittitas Turbines (ROKT) is a citizen-based organization. Members have participated in securing a local public process that assures mandated public participation<sup>2</sup>; contributed to the development of local

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<sup>1</sup> Residents Opposed to Kittitas Turbines (ROKT) is a broad based community organization that has actively participated in all public processes regarding the review, siting and procedures for wind power projects in Kittitas County, Washington. The organization is comprised of property owners and supported by a wide range of community groups and environmental organizations. Exhaustive input has been provided by ROKT to Kittitas County, Counsel for the Environment and EFSEC.

<sup>2</sup> Kittitas County originally adopted Ordinance No. 2001-12, a development regulation amending provisions of the utilities chapter and authorized a variety of utilities (including wind farms) as conditional uses in various rural jurisdictions. Residents Opposed to Kittitas Turbines (ROKT) filed a petition with the Eastern Washington Growth Management Hearings Board (Case No. 02-1-0015) and challenged the public participation process in the adoption of the ordinance. No public notification was provided with regard to the ordinance. Horizon was a primary participant in the process which has a practical effect of eliminating the public from land use discussions regarding wind farms. Upon recognition of deficiencies and public notice and participation, Kittitas County adopted a moratorium on wind farm developments (Ordinance No. 2002-13) and proceeded with a public process to establish a “wind farm resource overlay zone”. Horizon chose not to participate in this public process although other wind farm proponents did participate in the process. Ordinance 2002-19 was adopted on December 3, 2002 and

siting procedures and standards; and commented upon project specific proposals. Horizon now asks that the public process be ignored and EFSEC substitute its judgment for that of local decisionmakers. This is an extraordinary step. In its entire history, EFSEC has not exercised its authority to preempt local land use decision-making. This is not the case to begin.

## II.

### Discussion

**2.1 Public Participation and Representation.** The EFSEC process has evolved to a point controlled by money, huge corporations and special interests. The people most affected – community members and impacted property owners – have been effectively precluded from participation because of the extraordinary complexity and expense of this process. It is virtually impossible to participate in an Intervenor status. The resources necessary are not available to the public. Assurances of an opportunity for public comment ring hollow when EFSEC representatives note that such testimony is of “lesser value” because it is not under oath. This process could not have been contemplated or continenced by the framers of this legislation.

**(a) Counsel for the Environment.** EFSEC legislation recognized this inherent problem in the administrative process. RCW 80.50.080 provides for the appointment of “. . . an assistant attorney general as counsel for the environment.” Representation of “. . . the public and its interest” is the foundation to counsel’s role in the EFSEC process. The statutory mandate provides, in pertinent part, as follows:

The counsel for the environment *shall represent the public and its interest* in protecting the quality of the environment. Costs incurred by the counsel for the environment in the performance of these duties shall be charged to the Office of the Attorney General, and shall not be a charge against the appropriation to the Energy Facility Site Evaluation Council. He shall be accorded all the rights, privileges and responsibilities of an attorney representing a party in a formal action.

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established applicable procedures. Horizon did not appeal or challenge the legislative determination.

Counsel for the Environment in *Olympic Pipeline Company Cross Cascade Pipeline Project* (Application No. 96-1) outlined its responsibilities as follows:

In each proceeding before the Council, the attorney general appoints an assistant attorney general as Counsel for the Environment (CFE). The charge of CFE is “to represent the public and its interest in protecting the quality of the environment”. RCW 80.50.080. There has been opposition throughout this case that the primary responsibilities of CFE are (1) to ensure, to the extent possible, that the Council has the information it needs to make an informed decision, and (2) to ensure that the Council’s siting analysis adequately balances the need for this project against the project’s potential impacts to the environment. It also has been CFE’s position that Olympic has the burden of proving that it has complied with EFSEC’s statutes and regulations and in demonstrating that its proposed pipeline should be sited.

Counsel for the Environment’s Opening Statement in the matter of Application No. 96-1, *Olympic Pipeline Company Cross Cascade Pipeline Project* – page 2.

Counsel for the Environment (“CFP”) has been a merry-go-round with substitutions effectively emasculating the obligation to “. . . represent the public and its interest in protecting the quality of the environment.” ROKT has provided detailed information, study and analysis to CFP on virtually every aspect of the proposed project. Despite assurances from earlier “Counsels for the Environment”, the interests and issues of the public have not been presented and the Council does not have the information it needs to make an informed decision.<sup>3</sup> CFP has failed altogether to become involved in the hearings. None of the information provided by ROKT has been submitted to the Council; environmental issues and impacts have not been effectively presented or developed; alternative site analysis is lacking; and no testimony has been

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<sup>3</sup> Counsel for the environment provided limited pre-filed direct testimony: Testimony of G. Thomas Tebb (Department of Ecology – Water Quality Program); and Direct Testimony of Kenneth R. Bevis (Washington State Department of Fish and Wildlife). No other testimony was provided despite receipt of literally volumes of information regarding every aspect of the project. ROKT provided the laboring oar but counsel for the environment failed to take any meaningful action to represent the public or address environmental impacts. The failures are even more exacerbated by objections submitted by the Applicant to the direct testimony of Kenneth R. Bevis. Applicant asserts, through rebuttal testimony, that Kenneth R. Bevis did not have authority to address or speak to these issues.

developed for preemption, need or impacts to the quality of the environment. The process and public are entitled to more under the legislative directive. This is the antithesis of a meaningful public process. See, *Blue Sky Advocates v. State of Washington*, 107 Wn.2d 112, 727 P.2d 644 (1986). The public and process is entitled to more in this case.

**2.2 Creation of Energy Facility Site Evaluation Council.** In 1970, the Legislature of the State of Washington created the Thermal Power Plant Evaluation Council and gave it authority to site nuclear power plants. That statute was based upon the premise that there was a critical public need for electrical power facilities. It called for a balance of public need against any adverse impacts to the environment. RCW 80.50.010. The goal was a one-stop permit process for these controversial projects.

A few years later, the United States encountered the Arab oil embargo and its first real energy crisis. There was a fear that much needed fossil fuels would run out. Long gas lines created a new sense of urgency. Driven by that era's crisis mentality, an omnibus energy bill was enacted. (Laws of 1975-76, Second Executive Sess., Ch. 108). The bill set up the State Energy Office and granted the Governor special emergency powers to declare a state of energy supply alert. Part of that bill amended the Thermal Power Plant Evaluation Council statute, renaming it the Energy Facility Site Evaluation Council (EFSEC) and extending its jurisdiction to cover all large energy facilities.

The statute (RCW 80.50.010) now states:

The legislature finds that the present and predicted growth in energy demands in the state of Washington requires the development of a procedure for selection and utilization of sites for energy facilities and identification of a state position with respect to each proposed site. *The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of natural resources of the state.*

\* \* \*

It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in

conjunction with the broad interest of the public. Such action will be based on these premises:

- (1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as established by the federal government and are technically sufficient for their welfare and protection.
- (2) *To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the aesthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.*

\* \* \*

- (5) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.

(Italics added).

The review process recognized the applicability and availability of local land use review processes. RCW 80.50.090(2). KKWPP is not consistent with state or county land use plans or zoning ordinances. Processes and guidelines have been established by Kittitas County for wind resource projects in a manner consistent with the directives of Growth Management Act (GMA).<sup>4</sup>

Horizon proceeded with the local land use process developed for wind farm siting and in accordance with Growth Management Act (GMA). No appeals were filed with regard to the local process.

Numerous other wind farm projects have been processed by local jurisdictions under similar legislative procedures and processes. Horizon processes have focused on locational choices and site specific impacts. Kittitas

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<sup>4</sup> Growth Management Act (GMA) was adopted to address uncoordinated and unplanned growth and assure development of comprehensive plans and regulations based upon citizen participation and coordination. RCW 36.70A.010. Included in the directives, was a legislative finding recognizing the "... importance of rural lands and rural character to Washington's economy, its people and its environment. ..." RCW 36.70A.011. The project site is located within rural lands under the Kittitas County Comprehensive Plan.

County approved the Wildhorse Wind Project because it was an appropriate location. Desert Wind (enXco) and Kittitas Valley Windpower Project (Horizon) were denied because of site and development incompatibilities.

EFSEC legislation is subject to the mandates and requirements established by the Growth Management Act (GMA). RCW 36.70A.103 provides:

State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250(1) through (3), 71.09.342, and 72.09.333.

The provisions of Chapter 12, Laws of 2001 2<sup>nd</sup> sp. in session do not effect the state's authority to cite any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to Chapter 36.70A RCW.

Growth Management Act (GMA) requirements for compliance with local comprehensive plans and development regulations are not preempted by RCW 80.50.110.

**(a) Balancing of Need and Public Interest.** EFSEC's governing statute, Chapter 80.50 RCW, which was passed in 1975, recognized a pressing need for new energy facilities. The Council must, however, go beyond that statement to determine whether there is a need for the proposed wind farm project. The premise as set forth by the legislature in RCW 80.50.010 indicates that the "need" identified by the legislature concerning new energy facilities was a need for "abundant energy at reasonable cost."

The three (3) separate premises set forth in RCW 80.50.010 indicate that the Legislature did not find that *any* additional increase in the state's ability to create energy was necessarily a public benefit or that *any* decrease in energy costs was necessarily a public benefit. The Legislature was looking to ensure an abundant supply of energy at a reasonable cost while at the same time ensuring the protection and enhancement of our environment and the protection of the public welfare.

In its *Northern Tier* pipeline decision in 1982, EFSEC construed RCW 80.50.010 to evidence a legislative intent to balance the generalized demand for energy with other public interest concerns:

It is apparent from the language of this provision that the legislature intended the council to consider the issue of demand for the facility not as an issue apart from substantive concerns, but only insofar as a balance need be struck between the project's ability to satisfy the generalized demand for energy facilities on the one hand and, on the other, public interest which might be effected by the proposal.

*Northern Tier*, Findings, Conclusion and Order at 8 (emphasis added).

Kittitas Valley Wind Power Project is but one of countless wind farm projects in the state of Washington. One has already been approved in Kittitas County with others (in appropriate locations) proposed for future consideration. In addition to the specific project proposals, large areas of available alternative sites are open for consideration as well as a plethora of sites in adjoining counties. Projects have already been developed and approved in Benton, Walla Walla and Klickitat Counties. The proliferation of wind farms is extraordinary within this state. Despite this fact, no meaningful information has been provided to EFSEC regarding alternative sites. The consideration of alternative sites is a mandatory element of environmental review under SEPA. In the presence of available alternative sites, there is no need for the particular project.

In *Northern Tier*, EFSEC also recognized that while the legislature found a need for energy generally, the legislature has expressed no opinion on whether the demand for a particular facility is sufficient to outweigh the facility's negative impacts on the public interest:

Implicit in the charge by the Legislature to the Council to balance demand against public interest, and the legislative grant of power to the Council to recommend a position of acceptance or rejection of an application, is the recognition that the demand for a particular facility, while it exists, may not be great enough to outweigh the facility's net detrimental affects on the broad interest of the public.

*Northern Tier*, at 477 (Conclusion of Law 9). The council then went on to conclude that it was not possible “. . . to determine that the projected benefits of the proposed [Northern Tier] facility will outweigh the projected risks to the environment, health, welfare, and safety of the people of this state.” *Id.* at 478 (Conclusion 10). The council recommended denial of the project. By requiring that the need for abundant and reasonably priced energy be balanced against the need to protect and enhance the environment and the public’s use of the environment, the legislature is clearly saying that simply providing more and/or cheaper energy is not enough to demonstrate a public need for a project.

EFSEC and the Counsel for the Environment are both charged with preserving and protecting the quality of the environment. With this goal in mind, we believe that the major issues to be addressed prior to recommendation to the governor are as follows: (1) preemption or compliance with local land use review processes; (2) need for the specific project; (3) preservation and protection of the quality of the environment and the public’s opportunity to enjoy aesthetic and recreational benefits of the air, water and land resources; and (4) comparative risk to the environment from the proposed project after consideration of alternative sites and locations.

**(b) Preemption of GMA/Local Land Use Planning.** At the heart of this case is the issue of state preemption. The combination of ineffective counsel and elimination of local processes marginalizes and virtually eliminate public input. EFSEC legislation sought to guard against these potential abuses by authorizing the Counsel for the Environment and recognizing compliance with local land use rules and regulations. Horizon has fought throughout this process to eliminate public participation. Other wind farm proponents have chosen to follow local procedures and processes. Horizon has fought local involvement from the inception of its project and made no meaningful effort to comply with local processes. Applicant makes the extraordinary request that the Council preempt local land use and zoning

processes and regulations. The purported authority derives from RCW 80.50.110 which provides:

- (1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction *which is now in effect under any other law of this state*, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superceded for the purposes of this chapter.
- (2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

Preemption is considered in the context of consistency and compliance with county or regional land use plans or zoning ordinances. RCW 80.50.090. This statutory directive recognizes that an application will be vested with regard to consistent and compliant ordinances and regulations. It does not authorize, however, the elimination of a local review process. It is impossible to determine consistency or compliance in the absence of completion of the local proceeding.

The issue of preemption is also significant in the context of “subsequently adopted” state legislation. State of Washington enacted the most pervasive changes in history to its land use processes with the adoption of the Growth Management Act (GMA). Statutory directives require that “. . . state agencies shall comply with local comprehensive plans and development regulations and amendments thereto. . .” RCW 36.70A.103. Applicant has not complied with local comprehensive plans and development regulations.

Department of Community, Trade and Economic Development include the following statement in submissions:

Both the EFSEC statute and the GMA statute must be complied with in permitting of energy facilities. The EFSEC statute does not give the Council authority to run roughshod over the GMA or local land use regulations. But neither

does the GMA, nor do the local regulations, have the authority to thwart the statutory EFSEC process.

CTED's Response to F. Steven Lathrop's Motion to Stay Adjudicative Hearing –

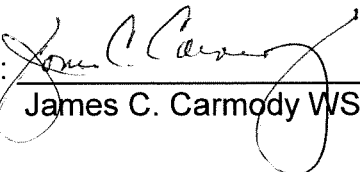
2. If this statement is correct, the only way to reconcile the competing statutory regimes is to stay the EFSEC proceeding and allow the local land use process to proceed in accordance with "local comprehensive plans and development regulations."<sup>5</sup> CTED seems to suggest that EFSEC has a responsibility for applying Growth Management Act (GMA) in its decision-making process. The application of GMA to the review process would require compliance with established planning goals (RCW 36.70A.020); recognition of resource lands (agriculture, forest, mineral lands and critical areas – RCW 36.70A.050); siting of essential public facilities (RCW 36.70A.200) and rules regarding "major industrial developments" (RCW 36.70A.365 and .367). None of these items are included in the current process.

### **III. Conclusion**

Sagebrush Power Partners has the burden of establishing the following: (1) preemption of local land use planning processes as mandated under the circumstances; (2) demonstrating a public need for the wind energy project; (3) preserving and protecting the quality of the environment and the public's opportunity to enjoy air, water and land resources; and (4) complying with directives of the Growth Management Act (GMA). The evidence will show that Sagebrush Power Partners has not met this burden of proof.

DATED this 5<sup>th</sup> day of September, 2006.

VELIKANJE, MOORE & SHORE, P.S.  
Attorneys for Residents Opposed to  
Kittitas Turbines (ROKT)

By:   
James C. Carmody WSBA 5205

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<sup>5</sup> A second possible reconciliation would be that the EFSEC process adopt the local comprehensive plan directives and proceed with a process utilizing the wind resource overlay district. This option is, however, an illogical application of GMA and EFSEC.

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8 **ENERGY FACILITY SITE EVALUATION COUNCIL**  
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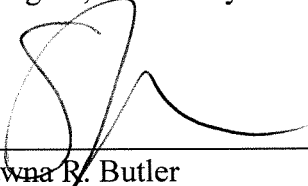
10 In the Matter of )  
11 Application No. 2003-01 )  
12 SAGEBRUSH POWER PARTNERS, LLC, )  
13 KITTITAS VALLEY WIND POWER PROJECT )  
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CERTIFICATE OF  
SERVICE

17  
18 I, Shawna R. Butler, hereby certify that on Tuesday, September 5, 2006, I served,  
19 by e-mail, the following document upon each person designed on the official service list  
20 in this proceeding:  
21

- 22 1. Supplemental and Restated Opening Statement of ROKT  
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24 DATED at Yakima, Washington, this 5<sup>th</sup> day of September, 2006.  
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29 Shawna R. Butler  
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**Kittitas Valley Wind Power Project Application No. 2003-01**

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